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No. 02-527

IN THE

Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, DIRECTOR, FEDERAL EMERGENCY MANAGEMENT AGENCY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Pursuant to Rule 15.8 of this Court's Rules, Petitioners file this supplemental brief to call the Court's attention to the decision of the Supreme Court of Ohio in *Ohio State Bldg. & Constr. Trades Council v. Cuyahoga Cty. Bd. of Commrs.*, ____ Ohio St. 3d ____ , 2002 - Ohio - 7213 (Dec. 27, 2002). The Ohio Supreme Court's opinion posted to its website as a manuscript document is set out as an appendix to this brief. Supp. Br. App. 1sa-36sa.

1. The Ohio Supreme Court's decision is highly pertinent here in three regards:

- *First*, the Ohio Court's decision underlines the importance of the recurring *Gould/Boston Harbor*[1] regulatory/proprietary dichotomy question raised by, and decided in, the *Ohio Building Trades* case and raised by this case and presented in our *certiorari* petition.[2]
- *Second*, the Ohio Court's decision further deepens the conflict on that regulatory/proprietary dichotomy question we outlined at pp. 14-21 of our *certiorari* petition.
- *Third*, the Ohio Court's decision provides well reasoned support, grounded in this Court's decisions, both for our contention, on the first question we present, that Executive Order No. 13202, at issue here, is regulatory government procurement action and not, as

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[1] *Wisconsin Dep't of Industry v. Gould*, 475 U.S. 282 (1986); *Building and Construction Trades Council v. Associated Builders and Contractors*, 507 U.S. 218 (1993) ("*Boston Harbor*").

[2] The first question presented in our *certiorari* petition is

> Whether Executive Order No. 13202 is "regulatory" government procurement action that is subject to preemption analysis or "proprietary" action that is immune from such analysis. . . . [Pet. i]

the D.C. Circuit held, proprietary action, *see* Pet. 21-26; and for our contention, on the second question we present, that the Executive Order is, and should be adjudicated to be, invalid as an improper Executive intrusion into the exclusive regulatory scheme Congress established in the National Labor Relations Act, *see* Pet. 26-30.

2. The *Ohio Building Trades* case and the Ohio Supreme Court's decision could not be more closely in point.

In the instant case we challenge the validity of Executive Order No. 13202—which flatly prohibits construction managers retained by federal agencies or recipients of federal assistance from negotiating project labor agreements ("PLAs") specifying that all contractors and subcontractors working on a construction project must agree to adhere to the PLA—as a "regulatory" government procurement action that, under NLRA preemption principles, improperly intrudes into the regulatory field Congress occupied in that Act.

In the *Ohio Building Trades* case, the plaintiffs brought a parallel NLRA preemption challenge to the validity of a parallel Ohio procurement provision—"R.C. Chapter 4116, as enacted by Am.H.B. No. 101 of 123rd General Assembly, which flatly prohibits public authorities from entering into or enforcing project labor agreements on public construction projects," Supp. Br. App. 2sa.

In the instant case the D.C. Circuit rejected our challenge to the Executive Order on the ground that the Order is a "proprietary" government procurement action not subject to preemption analysis. According to the Court of Appeals "[a] condition that the Government imposes in awarding a contract or in funding a project is regulatory only when . . . it addresses employer conduct unrelated to the employer's performance of contractual obligations to the [Government]," and "[b]ecause the Executive Order does not address the use of PLAs on projects unrelated to those in which the

Government has a proprietary interest, the Executive Order establishes no condition that can be characterized as regulatory." Pet. App. 13a.

In contrast, in the *Ohio Building Trades* case, the Ohio Supreme Court upheld the challenge to Ohio R.C. Chapter 4116.

The Ohio Court—after a thorough discussion of NLRA §§8(e) and (f), 29 U.S.C. §158(e) and (f), and this Court's decisions interpreting their authorization of the negotiation of PLAs in the construction industry, Supp. Br. App. 6sa - 13sa, and a painstaking review of this Court's decisions articulating and elaborating the *Garmon* and *Machinists*[3] NLRA preemption doctrines, Supp. Br. App. 14sa-24sa—held:

> [W]e must conclude that Section 8(f) and the construction-industry proviso to Section 8(e) are clear manifestations of Congress's intent to preclude the states from regulating PLAs in the construction industry. . . . [I]t makes no further difference whether we engage in a *Garmon* or *Machinists* analysis. The application of either rule necessitates a withdrawal of state power, except where the state acts as a market participant. [Supp. Br. App. 24sa.]

As the Ohio Court said, that holding brought that court to "the final and decisive issue in this case, which is whether R.C. Chapter 4116 amounts to government regulation or constitutes proprietary conduct on the part of the state." Supp. Br. App. 24sa. And, on that issue—after a close analysis of this Court's *Boston Harbor* decision, Supp. Br. App. 24sa - 26sa, and of the lower court decisions elaborating

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[3] *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959); *Machinists v. Wisconsin Employment Relations Commission*, 421 U.S. 132 (1976).

the *Gould/Boston Harbor* regulatory/proprietary dichotomy, Supp. Br. App. 26sa - 33sa—the Ohio Court concluded:

> We cannot conceive of R.C. Chapter 4116 as anything but regulation. R.C. Chapter 4116 is all about labor policy. Its stated purpose is "to prohibit public authorities from imposing certain labor requirements as a condition of performing public works." Preamble to 1999 Am.H.B. No. 101. Rather than constituting proprietary conduct on the part of the state, R.C. Chapter 4116 essentially prohibits the state, its contracting authorities, and any institution supported in whole or part by public funds from engaging in proprietary activity when purchasing construction services or directly employing labor by prohibiting them from entering into or enforcing a PLA on any public construction project regardless of economic or other proprietary concerns. . . .
>
> R. C. Chapter 4116 is a blanket, across-the-board prohibition that precludes any sort of ad hoc determination as to the benefits or advantages of utilizing a PLA on a particular project. It is, therefore, "'tantamount to regulation' or policymaking." *Boston Harbor*, 507 U.S. at 229, 113 S. Ct. 1190, 122 L.Ed. 2d 565. [Supp. Br. App. 33sa.]

3. We believe that the Ohio Supreme Court's rationale for its conclusion that Ohio R.C. Chapter 4116 is government regulation and not proprietary conduct on the part of the State —which goes directly to the first question presented by our *certiorari* petition and which rejects as unsound the D.C. Circuit's regulatory/proprietary dichotomy theory in this case —is worthy of special attention.

The Ohio Court's conclusion in that regard rests on three salient points:

> • First, *Boston Harbor's* discussion of the regulatory/proprietary dichotomy is most fairly read to

"suggest[] that a state would be acting as a regulator or policymaker, rather than as a purchaser, proprietor, or market participant, were it to impose an across-the-board rule that either requires or prohibits the use of PLAs on all public construction projects," Supp. Br. App. 26sa; *see also id.* at 24sa-26sa (analyzing *Boston Harbor*, 507 U.S. at 226-232).

• Second, the lower federal court regulatory/proprietary dichotomy decisions have generally reached "similar conclusions" as to *Boston Harbor's* meaning. Supp. Br. App. 26sa; see *id.* at 26sa-29sa (discussing these authorities). The Ohio Supreme Court cited in particular *Chamber of Commerce v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996)—which holds that President Clinton's "Permanent Striker Replacement" Executive Order is a regulatory government procurement action—and quoted extensively from the *Chamber of Commerce* Court's explanation of its holding as follows:

> "The premise on which the [*Boston Harbor*] Court's * * * analysis [of the character of the state's actions] rested, then, was that the Massachusetts governmental entity, [the Water Resources Authority], was not seeking to set general policy in the Commonwealth; it was just trying to operate as if it were an ordinary general contractor whose actions were 'specifically tailored to one particular job, the Boston Harbor clean-up project.' [507 U.S.] at 232, 113 S.Ct. at 1198, 122 L.Ed.2d 565. Surely, the result would have been entirely different, given the Court's reasoning, if Massachusetts had passed a general law or the Governor had issued an Executive Order requiring all construction contractors doing business with the state to enter into collective bargaining agreements with the union or its Massachusetts-wide counterpart containing § 8(e) pre-hire agreements.

Accordingly, we very much doubt the legality of President Bush's Executive Order 12,818—since revoked, but upon which the government relies—that banned government contractors from entering into pre-hire agreements under § 8(f).

"It does not seem to us possible to deny that the President's Executive Order [in this case, i.e., the Clinton Executive Order case] seeks to set a broad [labor] policy * * *. The President has, of course, acted to set procurement policy rather than labor policy. But the former is quite explicitly based—and would have to be based—on his views of the latter. * * * Whatever one's views on the issue, it surely goes to the heart of United States labor relations policy. It cannot be equated to the *ad hoc* contracting decision made by MWRA in seeking to clean up Boston Harbor." (Footnote omitted.) *Id.*, 74 F.3d at 1336-1337. [Supp. Br. App. 27sa - 28sa.]

• Third, the "contrary" decisions in the instant case and in *George Harms Constr. Co. Inc. v. New Jersey Turnpike Auth.*, 137 N.J. 8, 644 A.2d 76 (1994) can not be squared with *Boston Harbor's* reasoning. Supp. Br. App. 30sa - 33sa. The Ohio Court took issue with those decisions in the following terms:

[T]he D. C. Circuit essentially reasoned, as did the New Jersey high court in *George Harms Constr. Co., Inc.*, that the government acts as a proprietor, rather than a regulator, when it makes "just 'the type of decision regarding the use of labor agreements that a private project owner would be free to make.' " *Allbaugh*, 295 F.3d at 35, quoting the government's brief. According to the court, the government has acted in a propriety capacity despite the "blanket, across-the-board" prohibition of Executive Order 13,202 "'because "the only decisions governed by the

executive order are those that the federal government makes as [a] market participant.'" *Id.*, quoting the government's brief.

This reasoning, we believe, places the proverbial cart before the horse. These courts assume that a state acts as a market participant by doing what a private actor may do under the NLRA. But the gist of *Boston Harbor* is that a state may act as a private contractor would act *when it acts as a market participant.* Otherwise, the state would be permitted to regulate within a protected zone because a private actor may do so. As the New Jersey Supreme Court points out, for example, a private corporation may in its bylaws or elsewhere decide as a matter of policy never to utilize a PLA when purchasing construction services without running afoul of the NLRA. But this is not because such a decision is inherently indicative of proprietary activity. Indeed, the private contractor-developer in this situation would be acting not as a typical contractor would act in the furtherance of its proprietary interests, but as a "regulator" of the construction market. Instead, a private corporation or other legal entity may make such a policy decision without violating the NLRA because the NLRA does not preclude a private actor from attempting to regulate in an area reserved for market freedom or NLRB jurisdiction. [Supp. Br. App. 31sa-32sa (emphasis in original).]

Indeed, as the Ohio Court noted, its critique of the D.C. Circuit's decision here is foreshadowed by the *Boston Harbor* Court's explanation of the distinction between private party regulatory action and government regulatory action. *See* Supp. Br. App. 32sa-33sa quoting 507 U.S. at 229.

We submit that the Ohio Supreme Court was right in its reading of *Boston Harbor*; right in concluding that, under *Boston Harbor*, Ohio R.C. Chapter 4116's flat prohibition on PLAs on Ohio public construction projects is regulatory government action; and right in rejecting, as contrary to *Boston Harbor's* reasoning, the D.C. Circuit's conclusion that Executive Order 13202's flat prohibition on PLA's on federal and federally assisted projects is proprietary government action. And, because all that is so, we submit that the Ohio Supreme Court's *Ohio Building Trades* decision provides added reason for the Court to grant our *certiorari* petition in order to review and correct the D.C. Circuit's erroneous decision in the instant case.

CONCLUSION

For the reasons stated in the *certiorari* petition, in Petitioners' reply brief and in this supplemental brief, the petition should be granted.

Respectfully submitted,

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